IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 976 of 2002

WITH

CRIMINAL MISC.APPLICATION No. 1714 of 2004

IN

CRIMINAL APPEAL No. 976 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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ILIYAS VARISBHAI SHAIKH - Appellant
Versus
STATE OF GUJARAT & 1 - Opponents

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Appearance :
MS AMEE YAJNIK for Appellant.
MR KT DAVE, APP for Opponents.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 21/02/2007
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. Challenge in this Appeal filed under Section 374 of the Code of Criminal Procedure (“the Code” for short) is to the correctness of the judgment and order dated 09.10.2002 rendered in Sessions Case No.224 of 2001 by the learned Additional Sessions Judge, Ahmedabad by which the appellant – Iliyas Varisbhai Shaikh (“the accused” for short) has been convicted for commission of the offence punishable under Section 363, 366 & 376 of the Indian Penal Code (“IPC” for short) and sentenced to suffer RI for 10 years and fine of Rs.5,000/- and in default thereof,

RI for 6 months for the offence punishable under Section 376 of IPC and RI for 5 years and fine of Rs.2,000/- and in default thereof, RI of 3 months for the offence punishable under Section 366 of the IPC & R.I. for one year and fine of Rs.1,000/- and in default thereof, to undergo R.I. of one month for an offence punishable under Section 363 of the IPC. All the three substantive sentences were ordered to run concurrently.

2. Criminal Misc. Application No. 1714 of 2004 is filed on 20.02.2004 under Section 391 of the Code for the examination of additional witnesses pending this Appeal. The Court issued rule in this application on 08.03.2004 and it was ordered to be heard with appeal.

3. Since the facts of the case have been detailed in the judgment of the learned Additional Sessions Judge, Ahmedabad, it is not necessary for us to repeat the same all over again in verbatim and in detail in this

judgment. However, the basic facts which are necessary to be discussed in this appeal are as under:-

4. The allegation levelled against the accused is that on 05.06.2001, the prosecutrix P.W. 1 had filed complaint under Section 352, 452 & 506 of IPC at Gayakvad Haveli Police Station, Ahmedabad which is produced at Exh. 7 (page 49 of the paper book). Thereafter on 07.06.2001, the prosecutrix made a further statement stating inter alia that on 05.06.2001, she was afraid of her reputation, breaking of her engagement and of her parents and that as she was not feeling well, she could not give the full particulars in the complaint filed on 05.06.2001. She has stated in her further statement that before two months from 07.06.2001 i.e. on 07.04.2001, Zarina, the first wife of the accused had gone to hospital as her father was sick and she was asked to clean utensils and dress the children. She was alone in the house of the accused attending to

the work entrusted by the wife of the accused. The son aged about five years was sent to the house of his maternal grandfather to bring something. The accused closed door of the house and while the prosecutrix raised an alarm, the accused put handkerchief across her month by inhaling some smell into the nose of the prosecutrix which rendered her unconscious. It is alleged that she regained consciousness after half an hour and she found that her trousers and nicker were not there on her body and that she was raped. She found that her private organs were bleeding and that the body was paining. She was crying and then she redressed again. She told the accused that she would tell all that about to her parents. The accused threatened her to show her necked photographs if she would tell all that about to her parents. She did not tell about the above incident to her parents out of fear.

5. She has further stated that on 04.06.2001 at about 06.00 p.m., an incident took place in which the

accused met her near municipal quarters. She was asked to sit in the Maruti Car driven by the accused. From there, she was taken to Govardhan Hotel where he forcibly committed rape on her. She was then dropped near AMTS Quarters where she was seen by little daughter Reshma of the accused. The accused then dropped the prosecutrix at her house in PWD Quarters. That the first wife Zarina and brother-in-law Shabbir met her and called her parents there. When they asked her as to what happened, she could not reply them. The parents of the prosecutrix then brought her back home and gave 2-3 slaps and then she told the parents that the accused had committed rape on her. Thereafter, on 05.06.2001, her parents and uncle took her to Haveli Police Station at night and the prosecutrix gave complaint against the accused under Section 352, 452 & 506 of IPC. Thereafter, by her further statement on 07.06.2001 which is at Exh. 63, she made development in her complaint.

6. Pursuant to the said complaint and further statement, the investigation was put into motion and in pursuance thereof, the accused was charge-sheeted for offence punishable under Sections 363, 366 & 376 of IPC. It was in pursuance of the said investigation of the offence, that the charge-sheet was submitted in the Court of learned Metropolitan Magistrate, Ahmedabad.

7. As the offence under Section 363, 366 & 376 of IPC is exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate, Ahmedabad committed the case to the City Civil & Sessions Court, Ahmedabad.

8. The learned Additional Sessions Judge, Ahmedabad to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable under Section 363, 366 & 376 of IPC. The charge was read over and explained to the accused. As the accused pleaded not guilty to the

charge, he was put to trial and tried by the learned Additional Sessions Judge, Ahmedabad in Sessions Case No. 224 of 2001.

9. In order to bring home the charge levelled against the accused, the prosecution has, in all, examined as many as 10 witnesses, the details of which are as under :-

Sr. No.	Exh. No.	Particulars	Page Nos.
01.	06	P.W. 1 – Rizwana Haji Mohammed Abdul Rehman.	34-46
02.	09	P.W. 2 – Shamshadbegum Husenuddin Kadri	53-55
03.	22	P.W. 3 – Dr. Shilpaben Kanubhai Yadav.	81-83
04.	24	P.W. 4 – Haji Mohammed Abdul Rehman Chhipa.	85-95
05.	26	P.W. 5 – Abdul Aziz Ramzanbhai.	98-99
06.	29	P.W. 6 – Dhirajbhai Babulal Doshi.	100
07.	32	P.W. 7 – Satusing Kalusing Rathod.	105-118
08.	41	P.W. 8 – Dr. Bhavin Sainlal Shah	171-173
09.	45	P.W. 9 – Gangaram Goverdhan Prajapati.	179-181
10.	55	P.W. 10 – Prakash Mohanlal Bhaliya	190-196

10. To prove the culpability of the accused, the prosecution has also produced number of documents

and relied upon the contents of the same, details of which are as under :-

Sr. No.	Exh. No.	Type of Evidence	Page Nos.
01.	2	Charge.	18-19
02.	07	Complaint	49-51
03.	13	Receipt regarding Muddamal received by FSL.	63
04.	14	FSL letter to PSI, Gaikvad Haveli Police Station.	64
05.	15	FSL Report.	65-68
06.	16	Serological Report.	69
07.	17	Panchnama	70-72
08.	18	Panchnama	73-75
09.	19	Zerox copy of Nikah Register No. 22.	76
10.	34	Panchnama of place of incident.	122-123
11.	46	Zerox copy of relevant page of Register of Govardhan Hotel.	182

11. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Ahmedabad explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution in its entirety and

submitted that he has been falsely implicated in the offence alleged against him. In his further statement, the accused has further stated that the prosecutrix has herself called him on Mobile Phone on 07.04.2001 to come at AMTS Quarter and that he has gone there with his Maruti Car and at that time, she told him that if he would not marry her, she would die by throwing herself under the Truck. He has further deposed that thereafter he has gone along with two witnesses to Moraiya village's mosque and there he got married with the prosecutrix in presence of Kazi and two witnesses. He has further stated that the prosecutrix has told him that she is of 18 years old and she has willingly married with him. In support of his further statement, the accused, however, did not lead any evidence nor did he examine any witness.

12. On appreciation, evaluation, analysis and scrutiny of the evidence, the learned Additional Sessions Judge, Ahmedabad came to the conclusion that the accused

has committed an offence punishable under Section 363, 366 & 376 of IPC. On the basis of the said finding, the learned Additional Sessions Judge, Ahmedabad has convicted the accused for commission of the offence punishable under Section 363, 366 & 376 of IPC and sentenced him for the said offences, a reference of which is already made in earlier part of this judgment. This order of the learned Additional Sessions Judge has given rise to the instant appeal at the instance of the accused.

13. In the appeal memo filed before this Court, the accused has contended that the impugned judgment and order passed by the learned Additional Sessions Judge is illegal, improper and unjust and is contrary to the settled legal principles of criminal jurisprudence and is also contrary to the evidence on record and hence, is liable to be quashed and set aside. It is further contended that the learned Additional Sessions Judge has not properly appreciated the evidence, oral as well as

documentary, in their proper perspective and by misappreciation of the same, he has illegally convicted the accused for the offences for which he was charged and, therefore, the impugned judgment and order of conviction is liable to be quashed and set aside. The learned Additional Sessions Judge has committed gross illegality in considering the further statement of the prosecutrix recorded on 07.06.2001. He has completely ignored the fact of FIR having been registered at Exh. 7 on 05.06.2001 and the story narrated in the complaint. It is further contended that on 05.06.2001, when the complaint was filed by the prosecutrix, the same was filed by her in presence of her father, her uncle, her mother and the said complaint was sent by her which was registered for the offence punishable under Section 354 & 506 (2) of IPC. A copy of the said complaint was also given to the prosecutrix. But subsequently after two days by making a well-plan, the accused was implicated in serious offence when the father of the prosecutrix approached the higher Police Officer and the higher Police Officer directed the

Investigating Officer to record another statement of the prosecutrix wherein a very exaggerated story adding many more new facts was stated by the prosecutrix and the said statement was recorded at the instance of the higher Police Officer upon the insistence of the prosecutrix and her father. It is further contended that the second story narrated in further statement is a well-planned story narrating many more facts deliberately disclosing serious allegations which were not forming part of the complaint / FIR recorded at Exh. 7. Hence, the accused should not be convicted for the allegations levelled in the story subsequently got-up and created and which was not supported by reading the complaint at Exh. 7. It is further contended that the learned Additional Sessions Judge has committed a very serious error of law in relying upon the further statement of the prosecutrix and he has shown his clear inclination to give exhibit to the further statement which was recorded under Section 162 of the Code of Criminal Procedure. The observations made in this regard by the learned Additional

Sessions Judge in the impugned judgment are clearly contrary to the spirit of the provisions of law and the learned Additional Sessions Judge seems to have been carried away by the morals and sentiments rather than following the principles of law. It is, therefore, contended that the conviction based on such observations is illegal and deserves to be quashed and set aside.

14. The accused has further contended in the appeal memo that the learned Additional Sessions Judge has failed to appreciate that there was no medical evidence supporting the case of the prosecution and when the prosecutrix was examined only after recording of her further statement, the history given by her was bound to be inadmissible with the subsequent got-up story and, therefore, the history given before the Doctor ought not to have been given any importance. Despite this fact, the learned Additional Sessions Judge has given importance to the history given on 07.06.2001 and has taken the

corroboration from that to believe the story narrated in the further statement. Hence, the judgment and order of the learned Additional Sessions Judge is liable to be quashed and set aside. It is further contended that the defence raised by the accused has not been considered at all. The defence of the accused was that in presence of Maulavi, two witnesses and advocate, the Nikah ceremony was performed with the prosecutrix. When the said case was put forward, it was the duty of the Investigating Officer to whom the investigation was subsequently handed over to record the statements of those persons who are stated to be present in the said Nikah ceremony. Therefore, the impugned judgment and order of conviction was liable to be quashed and set aside. The learned Additional Sessions Judge has failed to appreciate the medical Certificate at Exh. 23, 43 & 58 and has erroneously come to the conclusion that the offence under Section 376 is proved against the accused.

15. During the pendency of this appeal as well as application for examination of additional witnesses, an affidavit is filed by the first wife of the accused and the prosecutrix on 07.07.2005 placing on record the settlement vide agreement between the accused and the prosecutrix. It is stated in the said affidavit that the accused had married the prosecutrix on 07.04.2001 at village Moraiya according to Muslim Personal Law. The accused got married earlier and had a living spouse and in whose life time, this second marriage was valid and permissible under the Muslim Law as there was a consent from the first wife. The alleged incident of rape against the prosecutrix came to be registered after the consented marriage. The said marriage was denied by the prosecutrix in her evidence during the course of trial. The reason being that she had never seen the Nikahnama document all throughout the trial until 25.05.2005. Therefore, though she had been told by the accused that they were married, even for her persistent demand, the Nikahnama was never shown to her till 25.05.2005. Hence, she was

justified in denying any marriage before the Court of law. However, as she was of a very young age, she believed at the time of incident that her action permitting even under force and emotional pressure was a part and parcel of her valid marriage. As there being repeated sexual requests rather than living together, she started demanding the evidence of a valid marriage which the accused took it very casually. Thus feeling betrayed that under the guise of marital promise, she was being taken for a ride and hence, she filed a complaint and prosecuted the accused for which he was convicted. Thus on 25.05.2005, upon seeing the original document, she has a change of mind and she has consented for a divorce by Talak. This was by taking into account that the Nikahnama was undoubtedly the original one.

16. It is further stated in the said affidavit that the accused was released on parole on 30.05.2005 only for the purpose of giving talak to the prosecutrix.

The Talaknama was executed as a document in presence of two witnesses, namely, Idrishbhai and Zahiruddin and then the settlement was sorted out. As per the settlement, the prosecutrix was to be compensated for her innocence and also for being exploited under the circumstances of her adolescent age. Therefore, demand to pay a sum of Rs. 2 Lac was deemed to be fit and proper under the given circumstances of settlement. The said offer for the amount of settlement was also accepted by the prosecutrix taking into consideration her future financial securities. A prayer was made in the said affidavit that in the larger interest of justice, conviction order may be set aside in light of the new set of facts and the settlement of the prosecutrix may be recorded and that the document of settlement may be considered by the Court for setting aside the conviction order passed by the learned Additional Sessions Judge.

17.It appears that despite the aforesaid affidavit, the

said settlement was not worked out and neither the appeal nor the application was decided by the Court at that time. Thereafter, the appeal as well as application were listed for hearing before this Court on 15.02.2007. The Court has heard Ms. Amee Yagnik, learned advocate appearing for the accused and learned Additional Public Prosecutor Mr. K.T. Dave for respondent – State of Gujarat. While considering the prayer made in the application for examination of additional witnesses, the Court has observed in its order dated 15.02.2007 that instead of recording their evidence by this Court or by the Trial Court, it would be in the interest of justice to permit the accused to place the duly sworn affidavits of those persons which would be considered while deciding the said application. Accordingly, the accused was permitted to obtain the affidavits of the persons whose names are mentioned in the prayer clause 'O' of the said application and to place these affidavits along with the documents, if any, in support of their affidavits, on the record of this Court. The Court has further observed that the

persons whose affidavits are to be obtained and permitted to be placed on record, are also directed to remain present before the Court on the next date of hearing i.e. 20.02.2007.

18. On 20.02.2007, when this matter is called out, learned advocate Ms. Amee Yagnik placed on record affidavits of (1) Nazmuddin Sheikh Imam Sheikh, (2) Azizbhai Hasanbhai Khalifa, (3) Akbarbhai @ Kadarbhai Mohmmadraza Khalifa and (4) Mohmmad Khalil Mohmmad Halim Sheikh. All these persons are personally present in the Court and they have admitted the fact stated in the affidavit as well as the signatures put by them on the said affidavits. Learned Additional Public Prosecutor Mr. K. T. Dave was asked to cross-examine these persons if he so desires. However, he has thought it fit not to cross-examine these persons. The said affidavits are, therefore, taken on record and facts stated therein are considered for the purpose of deciding this appeal.

19. Nazmuddin Sheikh Imam Sheikh in his affidavit dated 19.02.2007 stated that on 07.04.2001, when he was present in his house, Iliyas Varis had come to him and told him that Nikah was to be performed and he had to go as Kazi to the Dargah at Moraiya village near Sarkhej. He had gone there and as per Muslim Personal Law, he performed Nikah of the accused with the prosecutrix in the presence of two witnesses and one Vakil. He asked the prosecutrix thrice as to whether she accepted Nikah and her answer was in affirmative. He registered the said Nikah in his register and gave copy of Nikahnama to the accused as well as prosecutrix and one copy was retained by him. He admitted his signature on the Certificate of Nikah when it was shown to him. He further stated that he asked the prosecutrix about her age and she told that she was of 18 years old. She further told him that she got married with the accused willingly and with her free will. He, thereafter, came to know about complaint filed with

Gaekwad Haveli Police Station and police had recorded his statement. He further stated that this affidavit is to be produced before this Court as an evidence.

20. Mahmad Khalil Mahmad Halim Sheikh is the witness to the Nikahnama. He has admitted facts regarding Nikah of the prosecutrix with the accused performed on 07.04.2001.

21. Akabarbhai @ Kadarbhai Mahmadraza Khalifa is a witness to the Nikahnama. He admitted the fact regarding Nikah of the prosecutrix with the accused performed on 07.04.2001.

22. Azizbhai Hasanbhai Khalifa is the father of Mubarak who was present at the time of Nikah and signed Nikahnama at the time of its execution. Since his son is out of station at present, he filed this affidavit. He is aware about the fact that his son has signed

the Nikahnama and police has recorded the statement of his son.

23. While admitting this additional evidence and considering the contents thereof, the Court has applied its mind to the submissions made in this behalf by learned advocate Ms. Amee Yagnik and the learned Additional Public Prosecutor Mr. K.T. Dave. Mr. Dave has fairly submitted that since the prosecutrix has taken the stand before the Trial Court that she was forced to sign Nikahnama and since the defence has not examined these persons as their own witnesses, the learned Additional Sessions Judge has rightly convicted the accused for the offence punishable under Sections 363, 366 & 376 of the Code. However, in view of the affidavit of the prosecutrix dated 30.05.2005, settlement dated 07.07.2005, additional evidence brought on record now, happy and peaceful married life of the prosecutrix with her new husband and newly born child and deposit of Rs. 2 Lacs in her name jointly

with her husband and father, he has nothing to say in the matter. In this fact situation, the Court does not think it necessary to discuss about the evidence in great detail brought on record by the prosecution, during the course of trial.

24. The Court has also considered that the prosecutrix for the first time in her further statement pursuant to her complaint dated 05.06.2001 had come out with a version that implicated the accused for the offence punishable under Section 376 of the IPC. During the trial, it was brought on record that she got married to the accused and the Nikahnama showing the accused and prosecutrix as married was produced on record of the case at Mark B. The prosecutrix in her deposition at Exh. 6, page 34, has identified her signature in the Nikahnama, which is in Urdu language and has been translated in both, the Gujarati and English language and the same is produced along with the present application filed under Section 391 of the Code of Criminal

Procedure. The accused in his further statement, whatever has stated, was supported by the deposition at paragraph 7 of the prosecutrix. In addition, the prosecutrix has filed affidavit dated 07.07.2005 in this appeal supporting the case of the accused that he and the prosecutrix got married with each other and thereby saying so, she has accepted the Nikah with the accused.

25. It is further found from the record that the investigating authority during the investigation of the alleged offence, as mentioned in the complaint as well as in the further statement of the prosecutrix dated 05.06.2001 and 07.06.2001 respectively, had recorded the statements of Nazmuddin Shaikh Imam, Mohmmad Khalil Mohmmad Halim, Akbarbhai @ Kabirbhai and Mubarak Vajidbhai. Nazmuddin Shaikh Imam is the person who performed Nikah of the accused and the prosecutrix while the other three persons were witnesses to the Nikah. All these statements were recorded on 09.06.2001. However,

surprisingly, the prosecution has not examined any of these witnesses and there is no explanation on record of the case as to why these witnesses, who are extremely important to prove the probable innocence of the accused were not examined. It is the duty of the prosecution to bring out the truth on record so that justice is done. In the present case, the prosecution has suppressed a truth from being brought on record and thereby for reasons best known to the prosecution has withheld the vital evidence necessary to prove the probable innocence of the accused.

26. There is ample material which is brought on record now to show that the prosecutrix got married to the accused and there is oral as well as documentary evidence to prove this fact. The documentary evidence is in the form of Nikahnama, which clearly shows that the accused and prosecutrix got married with each other. A woman is free to marry after attaining of 15 years of age as per Muslim law. In

the present case, the age of the prosecutrix was 16 years and six months and she was validly and legally contracted into marriage, of course, subject to the Child Restraint Marriage Act. As per the prosecution case, the incident took place on 04.06.2001 at 6.00 p.m. The prosecutrix has in her deposition clearly stated that at about 6.00 p.m. on that day, she was in PWD Quarters and that she had met the accused at the Municipal Corporation Quarters where she was asked to sit in the Maruti Car driven by the accused. It is also her say that she had boarded the car as per the instruction of the accused. It is further her say that she herself called on the accused on his Mobile Phone No. 98240 77732 from a nearby telephone booth and asked him to see her and that she was proceeding towards AMTS quarters. She has further deposed that on three earlier occasions, both, she and the accused, had gone and stayed at Govardhan Hotel. This factum of deposition depicts her conduct and establishes that she had abandoned the guardianship of her parents. Above all, it proves that there was no element of force in the act of the

accused of taking her in the car but on the contrary, it gives a picture that she was a consenting party all throughout. Thus, her deposition as well as the documentary evidence points out to a definite conclusion that no offences under Sections 363 and 366 can be said to have been established by the prosecution.

27. It is a known fact that the second marriage under the Muslim Law is permissible when the first marriage was also under the said law. In the present case, first marriage of the accused with Zarina is also an admitted fact. A muslim husband having four wives may not marry a 5th woman so long as any one of them is undergoing Iddat or divorce. Mark B is the Nikahnama or the marriage certificate, which clearly shows the signature of the prosecutrix. She has also admitted the factum of marriage in her FIR. She has then given a version that her consent was obtained by force. She has narrated the complete story as to how the marriage took place at Moraiya

village and stated further the way in which Nikah was performed according to the Muslim law. It is true that during the course of trial, subsequently she has changed her story and said that her consent was obtained by force. However, it is an admitted fact that the police has recorded statements of all natural and legal witnesses to the marriage but they have been subsequently dropped by the prosecution. Had they been examined, the case of the prosecution would have been different. A mere perusal of the affidavit of the prosecutrix dated 07.07.2005 wherein she has admitted the Talaknama executed on 30.05.2005 supports the case of the accused. The Talak was given as per her say by the accused while he was undergoing sentence in the present case. The document also proves that there was a marriage between the prosecutrix and the accused. Pursuant to conviction, Talak was given by the accused to the prosecutrix. In the said facts, the prosecutrix has admitted the Nikah as well as the Talak with the accused and that proves that she was a legally wedded wife of the accused at the time of the

alleged incident and, therefore, even if there was sexual intercourse, the same was with the legally wedded wife aged more than 15 years.

28. While taking this additional evidence on record, the Court has considered the following decisions which have been cited before the Court :-

A) In the case of **Rambhau & Another V/s. State of Maharashtra, AIR 2001 SC 2120** it is held that the doctrine of finality of judicial proceeding does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to sub-serve the ends of justice.

B) In the case of **Kailashben Bhavanishankar V/s. State of Gujarat, 1995 (2) GLH (UJ) 8**, this Court on considering the application for additional evidence along with the copies of the statement of

witnesses submitted by the accused and after calling for the case diary and original statements of witnesses, found that the prosecution had suppressed relevant materials from the Court. It was held that the witnesses present at the time of the incident and those that had come on the spot immediately were not examined though their statements were recorded. The Public Prosecutor had failed in discharging his duties. Therefore, the correct and complete facts must be put before the Court even if the facts are favourable to the accused.

In the present case also, the witnesses present at the time of Nikah are not examined though their statements were recorded.

C) A similar view is also taken by this Court in the case of **Gulammohammad Mohammad Yusuf Saiyad V/s. State of Gujarat, 1994 (2) GLH 82** wherein it is held that the additional evidence must be necessary not because it would be impossible to pronounce the judgment but because there would be

failure of justice without doing so and ultimately there was an order for permitting recording of additional evidence. In the present case, the Nikahnama and the statements of the witnesses amply prove that the prosecution case would not stand on its feet and would have absolutely collapsed if this material and important evidence was not suppressed by the prosecution.

D) In **State of Gujarat V/s. Satwara Kalyanji Mavji, 1993 (1) GLH 171**, this Court has taken the similar view and permitted additional evidence holding that it was essential for a just decision of the case.

E) In **Vishal Rajendra Trivedi V/s. The State of Gujarat, 1995 (2) GLH 1094**, this Court held that if immediate and urgent concern for the Court is to do justice and if indeed there is some material which clicks and appeals to the judicial conscience then not to examine the witnesses would be as good as gagging the mouth of justice. If the circumstances

demand, then the Court is duty bound to consider it for whatever worth it is at any costs.

F) As held by the Hon'ble Supreme Court in the case of **Popular Muthiah, 2006 (3) SCC (Criminal) 245**, the High Court can exercise suo motu inherent powers in the interest of justice. It can be done in appellate or revisional jurisdiction and no formal application for invocation of it is necessary. It can be exercised in respect of the substantive as well as procedural matters. It can be exercised in respect of incidental or supplemental power irrespective of the nature of the proceedings. Apart from inherent jurisdiction, the High Court can exercise supervisory jurisdiction under Article 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, 1973.

29. Considering the aforesaid settled legal position, for the purpose of taking on record the additional evidence and looking to the evidence of the

witnesses, Kazi who performed the Nikah of the prosecutrix and accused and considering the age of the prosecutrix that established that she was the wife of the accused, then there is no evidence worth the name as alleged by the prosecution against the accused. As per Muslim law, a girl is a major on attaining puberty and in the present case, the prosecutrix married to the accused when she was more than 15 years of age. Looking to the evidence of Kazi and other witnesses to the marriage, she was in fact more than 15 years of age and in that view of the admitted evidence, no offence much less the offence under Section 376 of IPC because of an exception thereto, can be said to have been committed or made out even prima facie against the accused. So far as the offence under Sections 363/366 of the IPC is concerned, in view of the decision of the Hon'ble Supreme Court in the case of **S. Varadharajan V/s. State of Madras, 1965 SC 942** and considering the admission on the part of the prosecutrix in her deposition and her subsequent

affidavit dated 07.07.2005, even those offences cannot be said to have been proved against the accused.

30. In the case of **Kuldeep Mahato reported in 1998 SCC (Cri.) 1460**, the accused was acquitted for the offences under Section 366 of the IPC as there was no indication in the statement of the girl that she was kidnapped with intention to marry against her will or in order that she may be forced to illicit inter-course.

In the present case also, considering the evidence of the prosecutrix, her affidavit dated 07.07.2005 and the additional evidence produced in this Court no offence under Sections 363 or 366 can be said to have been made out. In the present case, the prosecutrix is a grown up girl and looking to her evidence, affidavit and additional evidence, the act was voluntary and not in consequence of any misconception of the fact. It was not against her will

or without her consent. The absence of consent is not proved from the attending circumstances. The past, contemporaneous and subsequent conduct of the prosecutrix shows that she has taken conscious decision to participate in the act and, therefore, no offences except the sexual intercourse with legally wedded wife aged about 15 years or more is proved, much less the offence for which the accused is convicted.

31. Looking to the facts and the prosecution case as stated herein above, it appears to us that even if the prosecution case is accepted then also in view of the evidence and the affidavit dated 07.07.2005 filed by the prosecutrix as well as considering additional evidence produced before this Court, the prosecutrix was legally wedded wife of the accused at the time when the alleged offence was committed. Once we arrive at this conclusion, an exception to Section 375 comes into play which says that sexual inter-course by a man with his own wife, wife not being under 15

years of age, is not rape. Admittedly, the prosecutrix was more than 15 years of age at the time of commission of the alleged offence. Even if it is assumed to be rape, in that case also, the sentence which may be awarded to the accused may not be more than two years in view of the provisions contained in Section 376 of IPC which says that "..... unless the woman raped is his own wife and is not under 12 years of age, in which case, he shall be punished for imprisonment of either description for a term which may extend to two years or with fine or both." Since the accused has undergone the sentence of more than two years, he is required to be released forthwith. We derive support from the following judgments while arriving at this conclusion.

(1) In the case of **Sukhwinder V/s. State of Punjab, 2000 (9) SCC 204**, as the girl was below 16 years of age, the Hon'ble Supreme Court in view of the compromise filed before the High Court,

wherein the girl stated that she got married and did not want to pursue the matter further so as to lead happy and healthy married life with her husband, the sentence was reduced to the period already undergone.

In the present case also, a compromise was filed earlier before this Court and at the time of hearing of this appeal, a statement was made by Ms. Amee Yagnik, learned advocate appearing for the accused and in the presence of the father of the prosecutrix that the prosecutrix got married elsewhere and she recently delivered a child and she is living happy and peaceful life with her husband. She has also made the statement that as per the settlement arrived at earlier, an amount of Rs. 2 Lacs is given to the prosecutrix and it is invested in the Fixed Deposit in the joint name of the prosecutrix, her husband as well as father for the period of five years. It is made clear that though the amount is invested in the joint names, it exclusively belongs to the prosecutrix and the concerned Bank will see to it that on maturity,

the entire amount – principal as well as interest – will go to the prosecutrix. In view of this subsequent developoment and in view of the provisions contained in IPC, the sentence is required to be reduced to the period already undergone.

(2) In the case of **State of Gujarat V/s. Mohan Ravji, 1993 (2) GCD 360 (Guj.)**, this Court while reversing the acquittal judgment of the Trial Court and convicting the accused for an offence punishable under Section 376 of IPC has held that what is material is that the relations between the two families appear to have improved considerably since the days of the incident. The prosecutrix is happily married since quite some time to some one else and more over, she has issued children. The incident has been forgotten by the husband and the in-laws of the prosecutrix. Even the accused is now married. However, what is significant is that the accused choose to remain unmarried until the prosecutrix was married first. In view of this particular fact and

also in view of the fact that the offence was merely a technical one, the Court is of the opinion that the special circumstances exist for taking a lenient view in respect of the sentence to be imposed. The Court was informed that the accused has remained as an under trial prisoner for a period of 18 days. In the circumstances, the interest of justice would better be served if the accused is sentenced to a term of imprisonment for the period he has undergone as an under trial prisoner.

32. Seen in the above context, we find that the prosecution has failed to prove the charge framed against the accused for commissin of offences punishable under Sections 363 & 366 of IPC beyond reasonable doubt and, therefore, the impugned judgment and order of the learned Additional Sessions Judge is required to be quashed and set aside qua the offences punishable under Sections 363 & 366 of IPC is concerned. As far as the offence punishable under Section 376 of IPC is concerned, as

stated earlier, the prosecutrix being wife of the accused at the time when the alleged offence was committed, the maximum sentence which can be imposed upon the accused is of two years and since the accused has undergone sentence for the period of more than two years, he is required to be released forthwith.

33. For the foregoing reasons, the appeal succeeds in part and it is accordingly partly allowed. The impugned judgment and order of the learned Additional Sessions Judge, Ahmedabad dated 09.10.2002 rendered in Sessions Case No. 224 of 2001 convicting the accused for commission of the offence punishable under Sections 363 & 366 of IPC is quashed and set aside and the sentence awarded under Section 376 of IPC is reduced to the sentence already undergone by the accused. We, therefore, direct the respondent – State of Gujarat and the Jail Authorities to release the accused forthwith, if his presence is not required in any other case.

34. Since we have permitted the accused to lead additional evidence and the said additional evidence in the form of affidavits was taken into consideration while deciding this appeal, Criminal Misc. Application No. 1714 of 2004 is accordingly disposed of as allowed.

Sd/-

[A. M. KAPADIA, J.]

Sd/-

[K. A. PUJ, J.]

Savariya